## Subject Index


| | Page |
|---|---|
| Argument | 1 |
| I. Preliminary issues | 1 |
| A. The Sierra Club's standing is fully justified by the threatened injuries to its interest in Mineral King and Sequoia National Park | 1 |
| B. The preliminary injunction served the public interest | 7 |
| II. Merits | 7 |
| A. Introduction | 7 |
| B. Congress barred developments of more than 80 acres when it amended 16 U.S.C. §497 | 8 |
| C. The Disney use is illegal whether Mineral King is deemed within the game refuge or within the park | 13 |
| D. Neither the Disney development nor a newly emerged permit legalize the freeway across the park | 14 |
| E. All transmission lines in Sequoia National Park require Congress' approval | 18 |
| Conclusion | 20 |

## Table of Authorities Cited

### Cases


| | Pages |
|---|---|
| Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970) | 1, 4, 5 |
| Baker v. Carr, 369 U.S. 186 (1962) | 4 |
| Cipriano v. Houma, 395 U.S. 701 (1969) | 12 |
| Citizens Committee for the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970), cert. den. 400 U.S. 949 (1970) | 2, 5 |
| Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) | 15 |
| Grt. Northern Ry. Co. v. Sunburst Co., 287 U.S. 358 (1932) | 12 |
| In re Sherman C. Smith, 1 U.S.D.A. Board of Forest Appeals Decisions and Rulings Under the Forest Service Appeals Regulations 433 (1967) | 12 |
| Investment Co. Institute v. Camp, 401 U.S. 617 (1971) | 14, 15 |
| Pacific Power & Light Co. v. Federal Power Comm., 184 F. 2d 272 (D.C. Cir. 1950) | 19 |
| Scenic Hudson Preservation Conf. v. Federal Power Comm., 354 F.2d 608 (2d Cir. 1965), cert. den. 384 U.S. 941 (1966) | 5 |
| UAW v. Scofield, 382 U.S. 205 (1965) | 4 |
| United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) | 4, 5 |
| United States v. California, 332 U.S. 19 (1947) | 12 |
| United States v. Grimaud, 220 U.S. 506 (1911) | 10 |
| United States v. Schooner Peggy, 1 Cranch 103 (1801) | 8 |
| Utah Power & Light Company v. United States, 243 U.S. 389 (1917) | 12 |
| West Virginia Highlands Conserv. v. Island Creek Coal Co., 441 F.2d 232 (4th Cir. 1971) | 7 |
| Yakus v. United States, 321 U.S. 414 (1943) | 7 |
| Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), cert. den. 401 U.S. 916 (1971) | 8 |


### Opinions


| | |
|---|---|
| 34 Op. Atty. Gen. 320 (1924) | 10, 12 |
| 35 Op. Atty. Gen. 485 (1928) | 12 |

## Statutes


| | Pages |
|---|---|
| 5 U.S.C.: | |
| Section 702 | 4 |
| 16 U.S.C.: | |
| Section 1 | 3, 8, 16, 18 |
| Section 2 | 16, 18 |
| Section 3 | 18 |
| Section 4 | 18 |
| Section 8 | 18 |
| Section 8c | 16 |
| Section 20 | 15 |
| Sections 20a-20g | 15 |
| Section 21b | 20 |
| Section 45b | 8, 16 |
| Section 45c | 3, 8, 18, 19, 20 |
| Section 47b | 20 |
| Section 158 | 20 |
| Section 197 | 20 |
| Section 201b | 20 |
| Section 221b | 20 |
| Section 342b | 20 |
| Section 391b-1 | 20 |
| Section 402e | 20 |
| Section 403b | 20 |
| Section 404b | 20 |
| Section 407b | 20 |
| Section 408b | 20 |
| Section 410b | 20 |
| Section 497 | 3, 8, 9, 10 |
| Section 551 | 10 |
| Section 682 | 13 |
| Section 688 | 3, 8, 13 |
| Section 692 | 13 |
| Section 694 | 13 |
| Section 797 sub. (e) | 19 |
| Section 797a | 19 |
| 42 U.S.C.: | |
| Section 4321 | 8 |
| Section 4332 | 8 |
| 397 U.S.C.: | |
| Section 154 | 4 |

## Miscellaneous

Pages

*A Proposal for the Development of Mineral King from Walt Disney Productions* ..... 14

36 C.F.R. §211.21 ..... 12

36 C.F.R. §211.24 ..... 12

36 C.F.R. §211.24(g) ..... 12

36 C.F.R. §211.36 ..... 12

51 Cong. Rec. 4771, 9101 (1914) ..... 9

Hearings on H.R. 14469, H.R. 14760 and H.R. 15126 Before the House Select Committee on Water Power, 66th Cong., 3d Sess. (1921) ..... 19, 20

Hearings on S. 773 Before a Subcommittee of the House Committee on Agriculture, 72d Cong., 2d Sess. (1933) .. 9, 11

H.R. 13679, 63d Cong., 2d Sess. (1914) ..... 9

H.R. 14760, 66th Cong., 3d Sess. (1921) ..... 19

H. Rep. No. 1299, 66th Cong., 3d Sess. (1921) ..... 19

*Sierra Club Bulletin,* Vol. III, No. 2 (1900) ..... 3

Sundry Hearings on Certain Bills Before the House Committee on Agriculture, 71st Cong., 3d Sess. (1931) ..... 11

*Winter Activities in the National Park Service,* U.S. Government Printing Office: 1970-435-397/33 ..... 15

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1971

No. 70-34

SIERRA CLUB, a California corporation, *Petitioner*

vs.

ROGERS C. B. MORTON, Secretary of the Interior, et al., *Respondents*

**On Writ of Certiorari**
**to the United States Court of Appeals for the Ninth Circuit**

## REPLY BRIEF FOR PETITIONER

### ARGUMENT

#### I. PRELIMINARY ISSUES

**A. The Sierra Club's Standing is Fully Justified by the Threatened Injuries to its Interest in Mineral King and Sequoia National Park**

*Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150, 154 (1970) said that injury to aesthetic, conservational, and recreational values may be advanced by an appropriate litigant as a basis for standing. In opposing the Sierra Club's standing in this case, the Government necessarily challenges that decision.

The Sierra Club exists to preserve aesthetic and conservational values in the United States, and particularly in the Sierra Nevada Mountains. The Club asks this Court to preserve the aesthetic and conservational purposes of statutes several of which were enacted at its urging.[1] The Club's stake in the outcome of this case is underlined by each of the following facts:

[1]See generally Wilderness Society Brief 85.

a. It is a long-time, national, conservation organization committed to protecting scenic and recreational resources. *Citizens Committee for the Hudson Valley v. Volpe,* 425 F.2d 97, 103 (2d Cir. 1970), *cert. den.* 400 U.S. 949 (1970).

b. The Sierra Club was founded to conserve the natural resources of the Sierra Nevada Mountains. It has a special interest in, and a long history of involvement, with efforts to conserve those resources. (See books, articles and legislative history, Petitioner's Opening Brief 30, n.3)

c. The Disney project at Mineral King and the freeway and power transmission line across Sequoia National Park would injure the aesthetic and conservational interest of the Sierra Club and of every concerned member of the class which it represents. (A. 25-46)

d. The Club for several years sought to dissuade the Secretaries from approving the Mineral King project and urged them to conduct hearings on the issues. (A. 26)

e. While not emphasized in the record, there is no dispute that the Club represents the interest of its members who actually physically use and enjoy Mineral King and Sequoia National Park in their present state.[2]

The Government denies that the Sierra Club has standing because its interests are not concrete and because standing is not available in the absence of a special "statutory aid" where the injured class is broad. It is wrong on both counts.

---

[2]That use and enjoyment is graphically detailed in a letter dated August 7, 1965 from Sierra Club staff member Michael McCloskey to Forest Service Chief Edward Cliff, in which Mr. McCloskey sought hearings. He quoted from the account of a visit to Mineral King by Mr. Frederich Eissler, who, at the time, was a member of the Board of Directors of the Sierra Club. (A. 41, 42)

The Government does not deny the history of the Sierra Club involvement with Mineral King and the surrounding Sequoia National Park extending from 1899[3] down to and including its recent requests for administrative hearings on the issues involved in this case. When the Solicitor denies that the Club's stake in the outcome is concrete, he is arguing in substance that injury to aesthetic or conservational values *never* can produce the concrete adverseness necessary to assure a case or controversy.

Injuries to aesthetic and conservational values are not as easily measured as economic injury. But difficulty in measuring injury does not lessen the concrete adverseness of the injured party, which is the essence of a case or controversy.

Whatever challenge a court may face in evaluating the stake of other litigants who may seek to protect aesthetic or conservational values, the threat of injury to those values held by the Sierra Club in this case is beyond argument.

The Sierra Club is within the zone of interests protected by the conservation statutes[4] here in issue. The Solicitor admits as much, but argues that those statutes protect everyone and thus confer standing on no one. The Solicitor argues that when the harm is broadly felt, as are injuries to aesthetic and conservational values, the injury cannot be "distinctive or discriminating". Therefore, the argument goes, judicial review is not available. In substance, the Solicitor argues that only economic harm can furnish an adequate basis for standing, unless Congress has expressly afforded judicial review to aggrieved parties.

---

[3] *Sierra Club Bulletin*, Vol. III, No. 2 at 170 (1900).

[4] 16 U.S.C. §§ 1, 45c, 497, 688. The conservation purposes of these statutes are discussed *infra* and in the Sierra Club's opening brief.

This Court already decided to the contrary in *Data Processing*[5] when it confirmed that parties "aggrieved" by administrative violation of a statute concerned with aesthetic, conservational or recreational values have standing under the Administrative Procedure Act.[6] While statutes concerned with those values are for the benefit of the entire public, injury is experienced by only those to whom they are important. The Ninth Circuit referred to the Sierra Club as the "rugged few".[7]

But even though others may have been threatened with injury, that does not bar the Sierra Club's standing. *Cf. Baker v. Carr,* 369 U.S. 186 (1962) in which this Court found that the complaining voters had standing to assert " 'a plain, direct and adequate interest in maintaining the effectiveness of their votes,' . . ." and were not merely claiming ". . . 'the right, possessed by every citizen, to require that the Government be administered according to law. . . .' " just because the interest was one held by many other voters.[8]

According to the Solicitor, judicial review is not available when the federal administrator's duty runs to the nation as a whole. This argument, the result of which would be to insulate the most important and far-reaching subjects from review, is unsupportable.

The fact that the defendant administrators have been "entrusted" with conserving Mineral King and Sequoia National Park does not preclude a dedicated conservationist organization from assisting in that task. *Cf. UAW v. Scofield,* 382 U.S. 205 (1965); *United Church of Christ v. FCC,* 359 F.2d 994, 1003 (D.C. Cir. 1966).

---

[5]397 U.S. at 154.
[6]5 U.S.C. §702.
[7]A. 234.
[8]369 U.S. at 208.

The Solicitor dismisses *Scenic-Hudson Preservation Conf. v. Federal Power Commission,* 354 F.2d 608 (2d Cir. 1965), *cert. den.* 384 U.S. 941 (1966), and *United Church of Christ v. FCC, supra,* as examples of standing granted by special statute. He misunderstands the significance of those cases and this Court's citation of them in the *Data Processing* case, 397 U.S. at 154.

The special statutes involved in those cases only confirmed that Congress intended to provide judicial review. The standing of the organizational plaintiffs in each case was based on the finding that their non-economic injury gave rise to a case or controversy.

In *Scenic Hudson, supra,* the stake of a group of conservationist organizations was confirmed in the fact that ". . . by their activities and conduct [they had] exhibited a special interest in [the aesthetic, conservational, and recreational aspects of power development]."[9]

In *United Church of Christ, supra,* then Judge Burger rejected the notion ". . . that members of the listening public do not suffer any injury peculiar to them . . ."[10] and granted their organizational representative standing in television station licensing proceedings before the Federal Communications Commission on the ground that:

> ". . . Since the concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding, we can see no reason to exclude those with such an obvious and acute concern as the listening audience. . . . "[11]

The Solicitor completely ignores *Citizens Committee for the Hudson Valley v. Volpe, supra,* 425 F.2d 97. In that

---

[9]354 F.2d at 616.
[10]359 F.2d at 1000.
[11]359 F.2d at 1002.

case, the Sierra Club had standing in the absence of any "statutory aid" (other than the Administrative Procedure Act, which applies equally to the case at hand).

Under the decisions of this Court, a litigant need not, and therefore should not, resort to artifice by alleging injury to an inconsequential but unique material interest when injury to the litigant's aesthetic, conservational or recreational interest is the real reason for the lawsuit.

This case illustrates the point. As noted by *amici* Wilderness Society, *et al.*,[12] the Sierra Club sponsors pack trips originating at Mineral King. The Solicitor urges that the threat of injury to this inconsequential enterprise should have been advanced to establish the Club's standing and that its failure to do so somehow suggests that it cares more about a general principle than about Mineral King. The Solicitor cannot seriously believe this.

This activity is of such little importance to the Club that it would not incur all of the disadvantages of litigation in an attempt to protect it. The adversity between the parties arises not over a possible interference with the Sierra Club's pack trips, but over the injury to its concrete aesthetic and conservational interest in Mineral King and Sequoia National Park threatened by the entire plan.

The Government seeks to create a "heads I win, tails you lose" situation in which either the courthouse door is barred for lack of assertion of a private, unique injury or a preliminary injunction is denied on the ground that the litigant has advanced private injury which does not warrant an injunction adverse to a competing public interest. Counsel have shaped their case to avoid this trap.

Our remaining aesthetic and conservational values are in danger of being lost unless the only likely challengers

[12] Wilderness Society Brief 62, n. 25.

—the conservationists—may obtain judicial review to compel the administrators to stay within the bounds of their statutory authority over special public lands.

**B. The Preliminary Injunction Served the Public Interest**

The Solicitor concedes that irreversible changes would have occurred at Mineral King and in Sequoia National Park if the defendant secretaries had not been enjoined.[13] His argument that this irreparable injury was not suffered by the Sierra Club falls with the grant of standing.

His argument that *Yakus v. United States,* 321 U.S. 414 (1943) applies to defeat the injunction is in error. Application of *Yakus* would require proof that delay would cause irreparable harm to a significant national interest, which in that case was the implementation of wartime emergency price regulations affecting the entire country. There is no parallel here. Delay does not cause irreparable harm to parties supporting the project,[14] and the project does not involve a national interest. In fact, the interest of the Sierra Club which was protected by the preliminary injunction is aligned with the public interest. *West Virginia Highlands Conserv. v. Island Creek Coal Co.,* 441 F.2d 232, 236 (4th Cir. 1971).

---

**II. MERITS**

**A. Introduction**

Unless this Court decides the important legal issues present in this case, Sierra Club standing will be meaningless because of the manner in which the Ninth Circuit dealt with those issues.

The Sierra Club argues that Congress expressed itself very clearly concerning the extent of developments in

---

[13]Respondents' Brief 34.

[14]Petitioner's Opening Brief 36, 37.

national forests, the Game Refuge at Mineral King and Sequoia National Park.[15] But, in 1969, Congress reconfirmed its conservation purposes with the National Environmental Policy Act ("NEPA").[16]

Congress required that, "to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in [the act]. . . ."[17] These include ". . . a national policy . . . to promote efforts which will prevent or eliminate damage to the environment and . . . to enrich the understanding of the . . . natural resources important to the Nation . . . ."[18]

Any doubts concerning the extent of the Secretaries' power to permit the degradation of natural resources now must be resolved so as to limit that power.

This Court is not hampered by the fact that NEPA was not in existence when the secretaries decided to act. ". . . [T]he correctness of [the decisions] must be determined by the applicable standards of today." *Zabel v. Tabb,* 430 F. 2d 199, 213 (5th Cir. 1970), *cert. den.* 401 U.S. 916 (1971); *cf. United States v. Schooner Peggy,* 1 Cranch 103, 110 (1801).

**B. Congress Barred Developments of More Than 80 Acres When it Amended 16 U.S.C. §497**

When Congress finally amended 16 U.S.C. §497 in 1956 to increase the maximum size of term developments in national forests from 5 to 80 acres, it was giving in to 25 years of accumulated pressure.

---

[15]38 Stat. 1101, 16 U.S.C. §497 (original) (1915); 16 U.S.C. §1 (1916); 16 U.S.C. §§45b, 45c, 688 (1926); 70 Stat. 708, 16 U.S.C. §497 (as amended) (1956).

[16]42 U.S.C. §§4321 *et seq.*

[17]42 U.S.C. §4332.

[18]42 U.S.C. 4321.

The Solicitor contends that the amendment ratified Agriculture's prior practice of issuing supplemental permits for excess acreage. He also argues that Section 497, as amended, is concerned only with providing certainty of tenure and does not limit the size of Disney's use.

This explanation of the legislation is incomplete and misleading; it considers only the goals of the proponents of the legislation and disregards the reason for including any acreage limitation, which was Congress' concern over the adverse effects of large developments on national forest land.

When Congress finally agreed to larger developments, it did not simply strike the five-acre limit as it would have if certainty of tenure had been the only consideration.[19] Rather, it limited term recreational uses to 80 acres and for the first time stated that incidental "facilities" were to be included within the acreage limit.[20]

In setting that limitation, it did not perform an idle act. Hearings on earlier proposals to increase the acreage limit show Congress' concern about size. Congressman Polk in 1933 hearings stated:

> "[I]t seems to me that 80 acres is a rather large tract and that 30 years is a rather long period of time, and that it might be a means whereby commercial interests might get control of a large part of the public domain."[21]

---

[19]One year prior to the enactment of Section 497, the Forest Service sought just such a statute. H.R. 13679, 63d Cong., 2d Sess. (1914); see 51 Cong. Rec. 4771, 9101 (1914).

[20]Compare 38 Stat. 1101 (1915) with 70 Stat. 708 (1956); (16 U.S.C. §497).

[21]Hearings on S. 773 Before a Subcommittee of the House Committee on Agriculture, 72d Cong., 2d Sess., Ser. P at 4 (1933).

This led to colloquy, reproduced below,[22] which further reveals the worry of Congress.

The 80 acre limit was the clearest expression possible of Congress' intention to limit developments.

Outside Section 497, there is no authority for the Secretary of Agriculture to permit private use of national forest land unless the use can be revoked at will.[23] Nothing in 16 U.S.C. §551 constitutes a separate grant of authority. *United States v. Grimaud,* 220 U.S. 506 (1911).[24]

In his campaign for relief from the five acre limit, the Secretary of Agriculture did reveal that he had been employing the revocable permit device for excess acreage.

---

[22]"MR. MARTIN. It is not only a question of homes, but a question of larger uses, or uses requiring larger tracts. For instance, if they provide skiing grounds, they want to have control over them, and, of course, you could not get much skiing ground on 5 acres.

"MR. ADKINS. You would not provide that anybody should control that much land for skiing?

"MR. MARTIN. They must develop the land for that purpose, of course, and clear it out. You have no idea of the extent to which winter sports have gone up in that section. . . .

"MR. ADKINS. The point is this, if this land is found to be valuable for private purposes, it has no business being a part of the public domain. They should be able to take it over under some form of organization, and develop it. If it is not fitted for that purpose, and if it is to be left in public use, I do not think that tracts of 80 acres should be leased for that period of time." *Id.* at 4, 5.

"MR. ADKINS. . . . Our national forests are better in their natural state for the good of the people, and I do not think we ought to create artificial commercial means to make money to destroy that natural beauty. If you do that, the beauties of nature will soon be gone and you will have an artificial proposition altogether." *Id.* at 20.

[23]See 34 Op. Atty. Gen. 320 (1924) and opinions cited therein.

[24]This Court concluded its analysis of that Section by stating:

> "The Secretary of Agriculture could not make rules and regulations for any and every purpose. . . . As to those here involved, they all relate to matters clearly indicated and authorized by Congress. The subjects as to which the Secretary can regulate are defined. The lands are set apart as a forest reserve. He is required to make provisions to protect them from depredations and from harmful uses." 220 U.S. at 522.

His point was not to obtain a ratification of the practice by Congress. On the contrary, he represented that the practice was undesirable and would not continue if he could grant permits for up to 80 acres. This led to the amendment.[25]

A major reason given to Congress for expanding the acreage limit was that winter sports facilities required more than five acres.[26] Agriculture repeatedly urged Congress to expand the five acre limit by representing that ski lifts would be erected within the proposed 80 acre area.[26a]

At Mineral King, the promise has been broken. All of the ski lifts (of which we know there will be 20),[27] along with a variety of other permanent improvements, would be located on lands covered by the surplus permit.

While the Ninth Circuit erroneously assumed that the supplementary permit need not be terminable at will (A. 228), the Solicitor recognizes that it must be. He argues that the supplementary permit *is* revocable at

---

[25]In 1931, the justification statement for the amendment read in part:

> "Experience has proved that 5 acres is insufficient to permit of the proper development of the most modern types of outdoor camps, hotels, resorts, sanitoria, etc. which, in addition to the principal structures, usually require the related use of lands for the *various necessary utilities, recreational services, etc.* now regarded as essential to such establishments." (Emphasis added) Sundry Hearings on Certain Bills Before the House Committee on Agriculture, 71st Cong., 3d Sess., Ser. V at 62 (1931).

In 1933, Assistant Forester L. F. Kneipp sought to calm Congress' fears about size by stating:

> "An 80-acre figure, with a 30-year period, seems to have made an adverse impression. *But those are the maximum limits.* They would not be authorized by permit, either in area or in time, unless the circumstances justified the maximum allowance of area or period." (Emphasis added) Hearings on S. 773, *supra,* at 16.

[26]See, e.g. Hearings on S. 773, *supra,* at 3, 4.

[26a]See Petitioner's Opening Brief 49-50.

[27]A. 53a.

will, stating that while it is "closely tied to the proposed term permit", the "Department officials would have the *power* to revoke it at any time."[28]

But revocability at will requires that "the occupancy is subject in theory and in fact to immediate termination at any time at the will of the Government", without remaining damage to government property.[29]

Any attempt at revoking Disney's supplemental permit would be subject to Disney's legal right to appeal[30] and to show that on balance, the entire record did not support the decision.[31] In fact, revocation would be (1) impossible without destroying the entire development, including the $35 million investment and (2) meaningless, since once Mineral King is blasted, bulldozed and otherwise dramatically altered, its natural state could not be restored.

The power of this Court to order that its decisions be applied prospectively only and to avoid threatening existing recreational developments is clear.[32] The only relevance of *Utah Power & Light Company v. United States,* 243 U.S. 389 (1917) and *United States v. Californic,* 332 U.S. 19 (1947), cited at page 49 of the Government's

[28]Respondents' Brief 50.

[29]34 Op. Atty. Gen. 320, 328 (1924); 35 Op. Atty. Gen. 485, 488-489 (1928).

[30]Forest Service Regulations, 36 C.F.R. §211.24.

[31]*In re Sherman C. Smith,* 1 U.S.D.A. Board of Forest Appeals Decisions and Rulings Under the Forest Service Appeals Regulations 433 (1967). Tulare County erroneously denies that the appeal would test the grounds for the termination. In quoting from a Forest Service Regulation to the effect that the standard of review is concerned only with whether the contested decision was "contrary to, or in conflict with, the facts, the law or the regulations of the Secretary of Agriculture", it omits the last five words of the provision. They read: "or is otherwise in error". 36 C.F.R. §211.21. The Regulations require that the contested decision be based on a "preponderance of the evidence" (36 C.F.R. §211.36) and require "a full and complete review of the challenged decision" (36 C.F.R. §211.24(g)).

[32]*Cipriano v. Houma,* 395 U.S. 701, 706 (1969); *Grt. Northern Ry. Co. v. Sunburst Co.,* 287 U.S. 358, 364 (1932).

brief, is that they establish that the Secretary of Agriculture would not be estopped from revoking existing permits on the strength of this Court's decision on Mineral King if he chose to do so.

### C. The Disney Use is Illegal Whether Mineral King is Deemed Within the Game Refuge or Within the Park

The Solicitor for the first time now argues that game refuges are comparable with national parks. He then argues that the Disney use would be legal in any national park, would be legal in Sequoia National Park in particular, and is therefore legal in the Game Refuge.

As set forth in the argument concerning the freeway in the Park, the Disney development would be legal neither in parks generally nor specifically in Sequoia National Park.[33]

Even if a Disney-type development could be found somewhere among the millions of acres of national parkland (and it can't), that would not decide its legality at Mineral King. Congress singled out all of Mineral King for unique protection. It directed the Secretary of Agriculture to "protect from trespass the public lands . . . and the game animals" within the Game Refuge.[34] None of the refuges where the Government claims recreational facilities have been authorized[35] are the subject of such specific protective legislation.[36]

Moreover, the few small scale ski developments in national parks[37] offer no precedent for the massive Disney development.

---

[33]See discussion *infra* at 15-16.
[34]16 U.S.C. §688.
[35]Respondents' Brief 53, n. 24.
[36]See 16 U.S.C. §§682, 692, 694.
[37]See n. 44 at p. 15.

The Solicitor now attempts to minimize the effect of the Disney development on the Game Refuge at Mineral King by arguing that "only some 3 per cent (approximately 465 acres) of the Valley's total area (15,000 acres) would be even slightly altered."[38]

These figures are new to the case. In the Ninth Circuit, the Government argued that 316 acres would be altered.[39] It has furnished no *evidence* on the subject in any court. In fact, while the Game Refuge with its remote mountainous reaches includes 15,000 acres, the Valley, where most of the huge project and the people would be concentrated, totals only 320 acres.[40]

The District Court found that major facilities would be located outside 80 acres on some 1,000 acres and that the resort "may affect 13,000 acres." (A. 187, 188) The Ninth Circuit did not overrule this finding. (A. 229, 230)

**D. Neither the Disney Development nor a Newly Emerged Permit Legalize the Freeway Across the Park**

Without any basis in the record, the Solicitor General offers two new props for Interior's decision to authorize the State of California to construct a "freeway"[41] across Sequoia National Park to serve Mineral King.

He claims, first, that the freeway would serve a park purpose because Mineral King is integral with Sequoia National Park and second, that a permit new to the case furnishes evidence of safeguards and park purposes. These are *post hoc* rationalizations which are entitled to no weight. *Investment Co. Institute v. Camp,* 401 U.S. 617,

---

[38]Respondents' Brief 53.

[39]Government's Reply Brief to the Ninth Circuit 5, 6.

[40]Computation from Disney's description of Mineral King Valley: "2 miles long and slightly over one-quarter mile wide." *A Proposal for the Development of Mineral King from Walt Disney Productions.*

[41]This is the term employed by the State (A. 57) which also has referred to the highway as "an access-controlled facility" (A. 54).

628 (1971), *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 420 (1971).

A highway designed to serve Mineral King serves no purpose in Sequoia National Park because Mineral King is located outside the Park.

But if Mineral King were integral with the Park, there would be no park purpose for the highway because the Disney development would not exist. The development would be illegal in any national park.[42]

If the Solicitor thinks that ". . . there can be little doubt that the proposed development fully accords with general national park purposes,"[43] the Secretary of the Interior disagrees. His approach to the development of ski areas in national parks is as follows:

> ". . . These efforts have not been directed toward creating large, highly developed areas comparable with commercial ski spots, but rather toward more modest family-type developments where skiing may be enjoyed in an environment of great beauty."[44]

---

[42] 16 US.C §20, cited by the Solicitor, does not provide authority for the resort. That section, which with Sections 20a-20g was enacted to assist the financing of necessary projects, states that facilities may be built only as necessary to permit the use and enjoyment of parks. Even then, construction must be "carefully controlled" so as not to impair park values.

[43] Respondents' Brief 54.

[44] *Winter Activities in the National Park Service*, U.S. Government Printing Office: 1970-435-397/33 at 2. The comparative impact of the six recreational facilities referred to on page 54 of the Government's brief and of the Disney facilities at Mineral King can be measured by the nature and amount of the skier lift equipment which is installed. That equipment is as follows: (1) Mount Rainier: 4 rope tows, 1 Poma lift (*Id.* at 14); (2) Sequoia and Kings Canyon National Parks: 3 rope tows (*Id.* at 18); (3) Yosemite National Park: 4 T-bars, 1 chair lift (*Id.* at 21); (4) Olympic National Park: 3 rope tows (*Id.* at 16); (5) Lassen Volcanic National Park: 2 rope tows, 1 Poma lift (*Id.* at 13); (6) Rocky Mountain National Park: 2 T-bars, 2 Poma lifts (*Id.* at 17).

This Court may judicially notice the relatively minor impact on natural values of rope tows, T-bars and Poma lifts on the one hand and the relatively major impact of chair ski lifts and gondolas on the other.

***Disney proposes 22 chair ski lifts and gondolas at Mineral King!***

Moreover, for Sequoia National Park, Congress in 16 U.S.C. §45b set specific limits on developments:

> "Said Secretary may, in his discretion, execute leases to parcels of ground *not exceeding ten acres* in extent at any one place to any one person or persons or company for *not to exceed twenty years,* when such ground is necessary for the erection of buildings for the accommodation of visitors." (Emphasis added)

The Disney plan would violate both the time and space limitations. Since the proposed Disney development could not be justified inside Sequoia National Park, it furnishes no park purpose for the freeway.

The Solicitor is left with the argument that Interior's alleged obligation to cooperate with Agriculture "in the supervision, management and control of contiguous lands under their respective control"[45] justifies a highway not supportable on any other ground. Neither 16 U.S.C. §2 nor 16 U.S.C. §8c, cited by the Solicitor, identifies such an obligation.

When Congress directed the Secretary of the Interior to manage the national parks so as "to conserve the scenery and natural and historic objects and the wild life therein" and to provide for their enjoyment in such a way "as will leave them unimpaired for future generations" (16 U.S.C. §1), it left him no discretion to authorize physical changes unless his purpose was to provide for the enjoyment of the park and its values. The Secretary's cooperation with other federal officials who manage public lands must occur within the limits of his power. Otherwise such "cooperation" would thwart the will of Congress. The illegal effect on the park values of a freeway

---

[45]Respondents' Brief 57.

would be the same whether it provides access to a huge development within the Park or outside it.

The Solicitor also contends that the highway would serve the needs of Sequoia National Park by improving access to it. Any new highway through virgin parkland would improve access to the area remaining on either side after the highway was laid down, in the sense that it would make the remaining area visible to people passing through in automobiles.

The Solicitor's brief now unveils, for the first time in this case, a permit purportedly identifying park purposes for the highway (scenic overlooks, parking, connections with other park roads, etc.).[46] This "Supreme Court permit" was not before the District Court and differs significantly from another permit which the Government first offered in its Ninth Circuit reply brief.

Even if we rewrote history and assumed that the Secretary had in mind these "park purposes" when he approved the highway, he could not have achieved them with the permit in its latest form.[47]

The Solicitor also advances the "Supreme Court permit" as evidence that the "road would not pose any real dangers to the park lands."[47a] Presumably what is meant

---

[46]Respondents' Brief 55, 56, n. 27.

[47]Clause 20, cited as authority for the statement that the highway would feature scenic overlooks and roadside parking areas, in fact provides that such facilities "shall be located and constructed as mutually agreed by the State and the Service." Obviously this language does not compel the State, which is paying for the highway, to agree to build the facilities. Clause 35 is cited for the statement that the highway will feature "interchanges and connections with other Park roads." Respondents' Brief 56, n. 27. Clause 35 in fact provides that: "The State shall provide suitable access and connections to existing roads within the Sequoia National Park only at locations mutually agreed upon." Again, this language guarantees nothing to the Secretary. What is even more absurd is that there are no "other Park roads" with which to connect or interchange other than the existing Mineral King Road!

[47a]Respondents' Brief 58.

is that except as to park lands actually used for the highway, its bridges, cuts, fills and supporting structures, there will be no damage. The assurances found in the permit apply only to that portion of the Park which remains after the highway cuts its swath.[48]

Interior is powerless to authorize the State to occupy 220 acres of National Park for a highway use.[49] This lack of authority may not be circumvented by including a revocation provision[50] in the permit for a use that 1) must continue for a term in order to provide access to a term use; 2) is of such a massive and permanent character that restoration of the Park to its natural condition upon termination of the use would be impossible; 3) involves an investment which conservatively is estimated at 25 million dollars. (A. 29)

**E. All Transmission Lines in Sequoia National Park Require Congress' Approval**

The Solicitor argues that even though 16 U.S.C. §45c reads otherwise, Congress' approval is not needed for a transmission line across Sequoia National Park to serve

---

[48]The Government asserts that the freeway would be on the same right-of-way as the old road. See Respondents' Brief 57. The record proves otherwise. (A. 73) In its reply brief in the Ninth Circuit, the Government stated at page 12:

> "Professor Clarkeson of M.I.T., the Department's consultant, tried to follow the old road's contours, but this proved impracticable. The proposed road, therefore, will follow the old cut for only a short distance."

[49]The Government relies primarily on 16 U.S.C. §8, which authorizes the Secretary of the Interior to construct roads in national parks. But the permit in question is not merely a contract with the State of California to build a highway; it transfers to the State long term control over park land. Sections 1 and 2-4, also cited by the Government, are not authority for term road permits or for any use which does not serve a park purpose.

[50]In the "Ninth Circuit permit," the term was twenty years. In the "Supreme Court permit," the dates which define the period of effectiveness are left blank and the fifteenth condition reads: "*Revocation*—This permit may be terminated upon breach of any of the conditions herein or at the discretion of the Director, National Park Service."

Mineral King. He claims that the sole purpose of 16 U.S.C. §45c, enacted in 1926, was to prevent hydroelectric projects within the expanded Park by removing the Park from Federal Power Commission jurisdiction. The argument is that this was the only purpose of identical language in 16 U.S.C. §797a passed in 1921 to protect parks as they existed at that time.

The legislative history of Section 797a proves the contrary. In enacting Section 797a, Congress rejected another bill which simply would have excluded parks from Federal Power Commission authority.[51] The difference between the bills was carefully explained to Congress by the Executive Secretary of the Power Commission, who noted that the bill which became Section 797a was "broader in scope" and would prohibit components listed therein "for whatever purpose used, whether water power, water supply, or irrigation, without the express approval of Congress."[52]

Congress was told that Section 797a would require it to approve *all* transmission lines across national parks.[53] Congress showed its concern in Section 797a, and later in Section 45c, not only with power developments as a whole, but also with the adverse effects of the structures set forth in the statutes.[54] The language of Section 797a and

---

[51]H.R. 14760, 66th Cong., 3d Sess. (1921). The Power Commission's licensing authority is contained in 16 U.S.C. §797 subd. (e). See *Pacific Power & Light Co. v. Federal Power Comm.*, 184 F.2d 272, 274 (D.C. Cir. 1950) which notes that FPC jurisdiction is limited to projects and "project works." Sections 797a and 45c do not contain the limiting term "project works."

[52]H. Rep. No. 1299, 66th Cong., 3d Sess., at 3 (1921).

[53]When a congressman suggested that if the power source was outside the park, a transmission line across the park was a "little matter", Secretary of the Interior John B. Payne made it clear that Congressional approval would nevertheless be required. Hearings on H.R. 14469, H.R. 14760 and H.R. 15126 Before the House Select Committee on Water Power, 66th Cong., 3d Sess. at 17 (1921).

[54]In supporting the bill which became Section 797a, Secretary of Agriculture Edwin Meredith stated, "[T]he public should have notice whenever there is a proposal to utilize the parks, or any

Section 45c has not been repeated where projects and their associated components are the sole target.[55]

The Government's argument that the transmission line is legal because it serves the Disney project at Mineral King (which the Government now asserts is integral with the Park) is unavailing. Not only is Mineral King not located in the Sequoia National Park[56] but even if it were, Section 45c does not exempt transmission lines serving a park. The transmission line causes the same damage whether it carries power *to* the park or *from* the park.

---

## CONCLUSION

For the foregoing reasons, and those set forth in Petitioner's Opening Brief, it is respectfully submitted that the judgment of the Ninth Circuit should be reversed.

November, 1971.

LELAND R. SELNA, JR.,
MATTHEW P. MITCHELL,
FELDMAN, WALDMAN & KLINE,
*Attorneys for Petitioner.*

LEO E. BORREGARD,
ROBERT W. JASPERSON,
GREGORY ARCHBALD,
*Of Counsel.*

---

portion of them, for purposes other than those for which they were originally created." Hearings on H.R. 14469, H.R. 14760 and H.R. 15126, *supra*, at 27.

[55]When Congress sought only to insure that hydroelectric projects would not be licensed in new parks, it added the following or similar language in the enabling legislation: ". . . the Federal Power Act shall not apply to or extend over such lands." See 16 U.S.C. §§21b, 47b, 158, 197, 201b, 221b, 342b, 391b-1, 402e, 403b, 404b, 407b, 408b, and 410b.

[56]16 U.S.C., §688; see discussion *supra* at 15.